IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 443

HARRY O. FAULX,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of The Davis and Salt Lake Western Railway Company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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INDEX.

SUBJECT INDEX.

Page

Petition for Writ of Certiorari:

Summary and Short Statement of Matter Involved 1

Jurisdictional Statement 3

Questions Presented 3

Reasons Relied On For Allowance of Writ..... 4

Prayer 5

Brief In Support of Petition For Writ of Certiorari.... 7

Opinion of Courts Below 7

Grounds on Which Jurisdiction of Supreme Court of The United States Is Invoked..... 7
voked 7

Statement of the Case 7

Specification of Errors 12

Argument.

Point I. The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioners case 12

Point II. The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured was not a place to work 14

Point III. The Supreme Court of Utah erred in holding as matter of law that defendants were not negligent in the construction, maintenance and use of the bridge at Chacra.... 19

Point IV. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law 26

Page

Conclusion 30

STATUTES CITED.

Section 237 of the Judicial Code, as amended, sub-paragraph (b), Section 1, Chapter 229, 43 Stat. 937, Title 28, U. S. C. A. Section 344 ..... 3, 7

45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404 ..... 3, 7, 29

Act of February 18, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A. Sec. 350 7

CASES CITED.

Bailey v. Central Vermont Ry. Inc., 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062 ..... 2, 13, 16, 23, 27

Bimberg v. Northern Pacific Railway Co., 217 Minn. 187, 14 N. W. 2d 410 (Cert. dnn. 322 U. S. 752, 89 L. Ed. 602, 65 S. Ct. 87)

Blair v. Baltimore & O. R. Co, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 2

Bly v. Southern Railway, 183 Va. 162, 31 S. E. 2d 564, rehearing den. 183 Va. 406, 32 S. E. 2d 659 19

Cawman v. Pennsylvania Reading Seashore Lines, 110 F. 2d 832, Cert. den. 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct. 24..... 18

Chicago Great Western Ry. Co. v. Peeler, 140 F. 2d 865 (8th C. C. A. 23

Cogswell v. Chicago & Eastern Ill. R. R. Co., —— U. S. ——, 66 S. Ct. 1122; 90 Adv. Op. L. Ed. 945 ..... 2, 13

Ehalt v. McCarthy et al (1943), 104 Utah 110, 138 Pac. (2d) 639.... 5
581, 58 L. Ed. 838 29

Grand Trunk Western R. R. Co. v. Lindsay, 233 U. S. 42, 34 S. Ct.

Haskins v. Southern Pacific Co., 3 Cal. App. 2d. 177, 39 P. 2d 895.. 23

Illinois C. R. Co. v. Skaggs, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249 29

Keeton, Administratrix of Keeton, dec'd v. Guy A. Thompson, Trustee in Bankruptcy for Mo. Pac. R. R. Co., —— U. S. ——, 66 S. Ct. 135, 90 Adv. Op. L. Ed. 57 2

Lavender v. Kurn, —— U. S. ——, 66 S. Ct. 740, 90 Adv. Op. L. Ed. 692 ..... 2, 13, 27

Murphy v. Boston and Maine Railroad, 65 N. E. 2d 923 (Mass.).... 19

Page

Porter v. Terminal R. Association, 65 N. E. 2d 31, 327 Ill. App. 645 18

Rashaw v. Central Vermont Railway, Inc., 133 F. 2d 253, 2 C. C. A. 1943 19

Smith v. Schumacker, 30 Cal. App. 2d 251, 85 P. 2d 967, Cert. den. 307 U. S. 646, 83 L. Ed. 1526, 59 S. Ct. 1046 23

Spokane & Inland Empire R. R. Co. v. Campbell, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683 30

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 ..... 2, 13, 26, 27

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 ..... 2, 13, 24, 29

Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465 ..... 2, 24, 29

Union Pacific R. Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318 ..... 29, 30

Virginia Railway Co. v. Staton, 84 F. 2d 133 (4th C. C. A.) 23

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

The petition of HARRY O. PAULY respectfully shows:

Summary and Short Statement of Matter Involved.

The Supreme Court of Utah, by a divided opinion, in a case arising under the Federal Employers' Liability Act, denied petitioner his right of trial by jury in a case where the evidence clearly demonstrated that respondent failed to furnish petitioner, its employee, a reasonably

safe place to work and that such failure proximately contributed to the cause of his injuries and, contrary to the express provisions of the Act and the controlling decisions of this Court, allowed and permitted proof of contributory negligence to defeat recovery in said action.

The trial court submitted the issues of the case to a jury of eight Utah citizens. The jury returned a unanimous verdict awarding petitioner substantial damages, and the trial Judge overruled respondents' motion for a new trial.

Three Justices of the Supreme Court of Utah, over the dissent of two Justices of that Court, set the verdict aside, reversed the judgment and ordered petitioner's case dismissed, the three judges being of the opinion that there was no issue of negligence to submit to the jury because in their judgment the evidence conclusively established, as a matter of law, that respondents were not negligent, that petitioner was negligent, and that his negligence was the sole proximate cause of his injuries.

Petitioner contends that in reaching this result the Utah Court ruled contrary to the principles of law announced by this Court in Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444; Bailey v. Central Vermont Ry. Inc., 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062; Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; Lavender v. Kurn, —— U. S. ——, 66 S. Ct. 740, 90 Adv. Op. L. Ed. 692; Keeton, Administrtrix of Keeton, dec'd v. Guy A. Thompson, Trustee in Bankruptcy for Mo. Pac. R. R. Co., —— U. S. ——, 66 S. Ct. 135, 90 Adv. Op. L. Ed. 57; Cogswell v. Chicago & Eastern Ill. RR. Co., —— U. S. ——, 66 S. Ct. 1122; 90 Adv. Op. L. Ed. 945.

In those cases this Court has held that questions such as decided by the Utah Court, as matter of law, should be submitted to the jury, and that the refusal of trial courts to submit such issues to the jury, or the vacating and setting aside of jury verdicts resting on evidentiary bases by appellate courts is an abdication by such Courts of their sworn duty to guard and protect the right of litigants suing under the Federal Employers' Liability Act to jury trial; that to thus deprive railroad workers of the benefits of this right is to take away a goodly portion of the relief which Congress afforded them.

Jurisdictional Statement.

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A. Section 344.

(b) The Statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on February 18, 1946. It is set forth at (R. 170, 197),is not yet reported in the Utah Reports, but appears at 166 Pac. (2d) 501. The petition for rehearing was denied May 31, 1946 (R. 198). This petition for certiorari was filed August 29, 1946.

Questions Presented.

The question presented is whether the Supreme Court of Utah properly applied the United States Statutes commonly called the Federal Employers' Liability Act, or whether the application made by it is inconsistent and in conflict with applicable decisions of the Supreme Court

of the United States. In a 3-2 decision the Utah Court held, as matter of law, in a case arising under the Act wherein there was no conflict in the evidence, (a) that the place where petitioner and other members of his train crew were working at the time he was injured was not a place to work; when, according to the evidence, respondents' train crews customarily used the place in question for the purpose of inspecting and protecting trains and making temporary running repairs and that petitioner and his fellow crew members in using the place where he was injured as a work place were following well established custom and practice; (b) that there was no duty on respondents' part to exercise care in furnishing their employees a reasonably safe place whereon to perform the usual and ordinary duties required of them in operating, inspecting, protecting, and repairing respondents' trains at the place where petitioner was injured; and (c) that petitioner's conduct was the sole proximate cause of his injuries when as matter of fact this conduct was, as found by the jury, contributory negligence only.

Reasons Relied On For Allowance of Writ.

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. It has set aside a verdict by the jury supported by substantial evidence and reversed the judgment based thereon and ordered the dismissal of petitioner's cause in a case involvoing rights of an employee of an interstate carrier by railroad protected by the Federal Employers' Liability Act. By its decision, the Court has

usurped the functions of the jury contrary to the repeated admonitions of this Court. It has arbitrarily set aside a finding of the jury based upon substantial evidence and proper instructions that respondents were negligent as charged, and that this negligence contributed to the cause of petitioner's injury, and, has allowed, permitted and used proof of contributory negligence to defeat recovery in an action arising under the Act. The Utah Court has thus wrongfully deprived petitioner of his right to a jury trial.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act in Utah, and specifically to determine whether the Utah Supreme Court shall be permitted to continue its policy of frustrating the operation of a Federal Statute and ignoring and refusing to follow the decisions of the United States Supreme Court and other Federal Courts construing it. See *Ehalt v. McCarthy* et al (1943), 104 Utah 110, 138 Pac. (2d) 639.

Prayer.

WHEREFORE, YOUR PETITIONER PRAYS that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled Harry O. Pauly, Respondent vs. Wilson McCarthy and Henry Swan, Trustees of The Denver & Rio Grande Western Railroad Company, Appellants, No. 6846, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court reversed and the judg-

ment of the Third Judicial District Court, in and for Salt Lake County, State of Utah, reinstated herein.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The verdict of the jury in Petitioner's favor was rendered on September 28, 1944 (R. 9) and the Judgment of the Court pursuant thereto was rendered on September 29, 1944 (R. 18, 19). The Opinion of the Supreme Court of Utah is set forth at R. 170 to R. 197, is not yet reported in the Utah Reports, but appears at 166 Pac. 2d 501.

Grounds on Which Jurisdiction of Supreme Court of The United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on February 18, 1946 (R. 197). Petition for rehearing was denied on May 31, 1946 (R. 198). Petition for Writ of Certiorari was filed on August 29, 1946. The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A. Sec. 350.

Statement of the Case.

Petitioner, an experienced conductor, who had been employed by respondents since boyhood and in train service for seventeen years (R. 78, 79), was injured while engaged

in the performance of his duty as conductor by a fall from a train standing on respondents' bridge over North Canyon Creek within switch limits at Chacra, Colorado, at about 11:50 P. M. on the 27th day of January, 1944. (R. 92).

Upon trial of his action brought under the Federal Employers' Liability Act, the jury returned a verdict assessing total damages in the sum of $75,000. (R. 9) $25,000 was deducted for contributory negligence. The trial Court ordered that respondents' Motion for New Trial be granted unless petitioner consent that the verdict be reduced to $34,500.00. (R. 20) He consented and the Motion for New Trial was denied and judgment entered accordingly. (R. 20-21)

Respondents were charged with negligently and carelessly failing to provide petitioner a safe place to work in that they failed to equip the bridge with foot walks and hand rails or to provide lights or markers to indicate its presence and dimensions when they knew that it was the custom and practice of their train crews to stop trains on the tracks at Chacra and on and over said bridge at all times of the day and night and in all kinds of weather for the purpose of inspection and repair and that in darkness said bridge could not be seen or distinguished from its surroundings, and under such circumstances was dangerous and hazardous to respondents' employees; that as a result of such negligence petitioner was caused to fall headlong from the caboose over the edge of said bridge while in the performance of his usual and ordinary duties. (R 2-5)

The freight train upon which Petitioner was working at the time of his injury was a west bound Red Ball freight (R 139) and consisted of eighty-six cars, an engine and caboose. (R. 82) Shortly after leaving Funston, which is six miles east of Chacra, petitioner and the rear-end brake-

man, Ventura, from their position in the caboose, noticed fire flying from the south side of a car fifteen or twenty car lengths forward from the caboose. (R 35, 86) This indicated that brakes were sticking and that the train should be stopped and the difficulty remedied. (R.36, 86). By means of a red fusee displayed from the window of the cupola the engineer was given a signal to stop the train. (R. 36, 70, 86). The fireman also noticed the sparks and fire and so reported to the engineer. (R. 69). The head-end brakeman, from the engine, observed the red fusee, reported the same to the engineer and acknowledged the signal by motion of his lantern. (R. 69). According to custom, the train was not stopped on the main line but was moved onto the tracks at Chacra in order that the necessary inspection and repairs could be made without tying up respondent's railroad. (R. 37, 69, 76, 77, 87, 88). The distance between the east and west switches of the passing track at Chacra is about 6600 feet. A bridge 92 feet long and 26 feet wide, spanning North Canyon Creek, is located approximately 2000 feet west of the east switch. The main line track is south of the passing track; the distance between the center rails of the two tracks is approximately 12 feet; the distance between the south rail of the main line track and the outside extremity of the bridge is two feet, nine inches; the overhang of the ordinary caboose is approximately two feet, six inches; the distance from the top of the rails to the bottom of the creek at the center of the bridge is approximately seventeen feet, nine inches. (R. 23-31, Ex. A. R. 205). There were no footwalks, platform or guard rails on the south side of the bridge. (Ex. A, R. 205, Ex. E, R. 207, Ex. H, R. 208, Ex. M, R. 210, 217). There were no lights or markers to give warning of its location or dimensions. (R. 42, 43, 67, 73, 95). The roadbed in that territory is constructed of black slag and on a dark and stormy night is indistin-

guishable from the darkness of empty space. (R. 34, 67, 68, 84, 85, 92, 96, 142, 143). It is the custom and practice to stop trains on these tracks within switch limits for the purpose of inspection and repair and to permit other trains to pass. (R. 43, 44, 67, 68, 86, 87, 88). In the event difficulties of any kind develop while the train is moving toward Chacra it is the conductor's duty to dismount, proceed to the point of difficulty, inspect and repair it as soon as possible after the train is stopped at Chacra. Petitioner determined that the train should be stopped at Chacra for the purpose of inspection and repair when he first observed the flying fire. (R. 86-88).

Petitioner's crew handled the situation in the usual, typical and customary manner. Although the evidence of the sticking brakes was observed by both the head-end and rear-end crews when the train was several miles east of Chacra, the train was not stopped until it reached that point, so that other trains could pass and the necessary inspection and repair made without tying up the railroad. (R. 68, 69, 88).

The work of train protection, inspection and repair made it necessary for petitioner, the rear-end and head-end brakemen to dismount from the train and pass along and over the territory adjacent to the tracks. (R. 38, 40, 89, 91, 92). Unfortunately the train was stopped when the caboose was standing upon the unguarded and unlighted bridge. (R. 41, 42, 92, 94, Ex. K-R. 209). The night was dark and stormy. (R. 89, 90). Ventura testified that it was "really dark that night." (R. 38). The engineer, Linkins, testified that "It was a black, stormy night, real dark * * *, have to feel your way." (R. 72). "Snow was just beginning to fall." (R. 37, 72). As the train was pulling to a stop, petitioner and Ventura prepared to dismount. At that time an east bound passenger train was passing on

the adjacent tracks. (R. 38, 89). Ventura, pursuant to his duties, alighted from the caboose on the south, rear corner and proceeded back along the tracks to protect the rear end of the train by flagging. He dismounted on the south side, the side opposite and farthest removed from the passing train, in compliance with the Safety Rules and because this was the safe and proper thing to do. (R. 38, 39).

Petitioner likewise prepared to alight from the train on the south side because of the Safety Rules and factors above mentioned (R. 90), and for the additional reason that he had noticed the fire flying from the south side of the train and knew that the trouble to be located and remedied was on the south side. (R. 90, 91, 93). He testified that he "naturally" alighted from this side because it was there he saw the trouble. (R. 91). With lantern and fusee in hand, he stepped upon the steps of the caboose, struck the fusee, glanced down, it was all black and it appearing that he was alighting on the shoulder of the right of way (R. 91, 92, 136, 137), stepped off and because of the nonexistence of a platform or footwalk, fell to the creek bed below, a distance of about eighteen feet (R. 93), and sustained the serious and permanent injuries complained of. Petitioner couldn't see the bridge, he testified. (R. 95, 143): "I didn't see any bridge. It looked to me there was —like the shoulder of the ground. It was all black before me."

Although Ventura alighted from the caboose at the very time it was coming to a stop on the bridge, he did not see it or know that it was there. (R. 54). After he had proceeded some distance back, he looked along the south side of the train and observed the yellow fusee burning in the bottom of the creek. He dropped a red fusee, ran to the bottom of the creek and found petitioner lying there. He asked petitioner how he fell and Pauly stated: "I thought we was past the darned bridge." (R. 40, 51).

Specification of Errors.

1. The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's case.

2. The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured was not a place to work.

3. The Supreme Court of Utah erred in holding as matter of law that defendants were not negligent in the construction, maintenance and use of the bridge at Chacra.

4. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law. (a) In holding that the failure of respondents to properly equip the bridge did not contribute to cause petitioner's injuries; and (b) that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.

ARGUMENT.

Point I.

The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's case.

The verdict of the jury was supported by substantial evidence. The evidence without conflict showed that petitioner was engaged in the performance of his required duties at a place provided by respondents for that purpose at the time he was injured. It further demonstrated that the place was dangerous and unsafe and that there was a very definite causal relationship between the dangerous and unsafe condition of the work place and petitioner's injuries. Therefore, the Court erred in setting aside the verdict and dismissing petitioner's case. The ruling of the Supreme Court of Utah is contrary to and

in conflict with the recent controlling decisions of this Court in the cases cited on page 2 of the Petition for Writ of Certiorari.

Where there is an evidentiary basis to support a verdict the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable. *Lavender vs. Kurn*, 66 S. Ct. 740, 90 Ad. Op. L. Ed. 692.

Questions of negligence under proper charge from the Court should be submitted to the jury for their determination, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact. *Tiller vs. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444.

To deprive railroad workers of the benefits of jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Bailey vs. Central Vt. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury. The jury is the fact-finding body and the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant vs. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

We believe that the procedure adopted by this Court in *Cogswell vs. Chicago & Eastern Ill. R. Co.*, — U. S. —, 66 S. Ct. 1122, 90 Adv. Op. L. Ed. 945, where certiorari was granted and the judgment of the 7th C. C. A. (153 F. 2d 94) setting aside the verdict of the jury in favor of plaintiff on the ground of insufficiency of the evidence was reversed, is justified in the case at bar.

Point II.

The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured was not a place to work.

The majority of the Supreme Court of Utah, in holding that the passing tracks at Chacra was not a place to work, amongst other things, stated:

> "The main road was single track. The passing track was one of many on the road to take care of train meets * * *. When there is trouble with the moving equipment on the road and it is possible to reach the passing track at Chacra the train moves in there so as not to hold up traffic. It is a fair inference that such sensible procedure is followed anywhere in single track territory. * * * There is nothing to show that the procedure is any different at the Chacra passing track than at any other passing track when a train in trouble is moved there for inspection and remedy. Indeed, the same sort of inspection and remedy in regard to hot boxes, sticking brakes, break-in-twos, broken air hose might have to be made anywhere on the main line if a passing track could not be reached." (R. 174).

And, continuing:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work. And in fact since repairs, adjustments or temporary improvisations may be necessary anywhere at any time along the main line, the whole main line would then have to be considered as a place to work for train crews engaged in spotting defects in cars or the locomotive which the motion of the train reveals and which interfered with this movement." (R. 174, 175).

After thus finding in effect that the territory within switch limits at Chacra was a place to work, the Court states (R. 177):

"We do not think there is sufficient evidence to go to the jury on the question of whether the passing tracks at Chacra were a place to work."

The evidence on this point was not in conflict. Three witnesses were called and each of them testified that this territory was a place to work and that its usage as a work place by petitioner and his crew at the time of his injury was in keeping with well-established practice.

Ventura testified that it was common practice for trains to stop and to pass one another at Chacra; that when there was trouble with a train a red fusee was displayed and the train stopped in order to make an investigation. (R. 43, 44).

Linkins testified that when anything happens to a train which makes stopping necessary, it is customary to try to stop between switches so as to avoid tieing the railroad up, that when the trains are so stopped the train crew dismounts and attempts to ascertain what the trouble is. The head-end brakeman proceeds back, the conductor proceeds forward until he meets the head-end brakeman, and the rear-end brakeman goes back and flags. (R. 68, 69).

Petitioner testified that in the event of any stop in this territory at night it was the duty of the rear-end brakeman to dismount from the caboose with his flagging equipment and proceed back to protect the rear end of the train; that in the event difficulties of any kind develop while the train is moving, the conductor must go to the point of the difficulty wherever it is as soon as the train is stopped; that when a train is stopped under such conditions, it is the duty of the head-end brakeman to dismount and proceed back along the train toward the rear end, and the duty of the conductor to dismount and proceed forward along the

train to meet the head-end brakeman and if he reaches the point of trouble first to rectify it and signal for the train to proceed. (R. 84, 87, 88).

All of the witnesses testified that this customary procedure was being followed at the time petitioner was hurt. There was no conflicting evidence. The holding of the majority that the tracks and adjacent territory within switch limits at Chacra was not a place to work is not only unsupported, but is contrary to the evidence and to the principles announced by this Court in *Bailey vs. Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062. The railroad employee in that case was fatally injured as a result of falling from an unguarded bridge. This Court held that his employer was required to use reasonable care in furnishing him a safe place to work and, amongst other things, stated:

> "That duty of the carrier is a continuing one from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting and infrequent."

It is difficult to perceive how the Court could possibly find as matter of law that the territory within switch limits at Chacra was not a place to work when the evidence without conflict demonstrated its usage as a work place by respondents' employees over a long period of time and that petitioner and other workmen were actually using it as a work place in the customary and usual manner at the time of the occurrence complained of. The very fact that the train was not stopped on the main line when the trouble was first observed, but the journey continued until the passing tracks were reached, and that each and every member of the train crew understood that this was the proper and customary thing to do indicates that these passing tracks were known and understood to be the place

provided by respondents to stop their trains and make necessary running repairs and inspections. The Utah Court does not discuss the point as to whether or not the making of inspections and repairs is work within the meaning of the phrase "place of work." But we do not believe that disagreement on this point is possible. Likewise, dismounting from trains is work. In order to inspect and repair the train it was necessary for petitioner and the other crew members to dismount. They could not inspect and repair the train from their positions in the caboose and engine. In inspecting and repairing trains it is necessary for the train crew members to pass along the trains over the territory adjacent to the tracks. It is interesting to note that as soon as the train stopped every train crew member, without further orders or instructions, undertook the immediate performance of his usual duties. The head-end brakeman dismounted and started toward the rear end of the train. The rear-end brakeman dismounted and proceeded back to protect the train by flagging. Petitioner was in the act of dismounting preparatory to going forward along the train to the point of difficulty when he fell from the bridge and was injured.

Not only has the Supreme Court of Utah usurped the functions of the jury in determining as matter of law that this territory was not a place to work, but it has made a finding which is contrary to all of the evidence. The reasoning of the Utah Court is interesting. We will not attempt to discuss all of the labored efforts of the Court to justify its conclusion, but will merely direct attention to the remarkable syllogism used by the majority:

> If the passing tracks at Chacra be a place to work then all of the passing tracks on the road are places of work, therefore the passing tracks at Chacra is not a place to work.

Whether or not a certain place is a place to work does not depend upon conclusions reached as a result of mental gymnastics or judicial contortions, but by the simple test of usage. Are employees required to perform any duties under their employment at the place? A place where an employee is required to perform his duties "though fleeting and infrequent" is a place of work and it becomes and is the non-delegable duty of the employer to exercise reasonable care to keep and maintain such place safe as a work place. *Porter vs. Terminal R. Association,* 65 N. E. 2d 31, 327 Ill. App. 645, where an employer was held responsible for the unsafe condition of the premises of a third person, when his employee in the course of his employment was injured while upon said premises as a result of their unsafe condition.

All of the evidence in this case was directed to the usage of the tracks at Chacra as a work place. There was no evidence with respect to any other part or portion of the respondents' railroad. Such proof was deemed irrelevant. The evidence clearly demonstrated that the territory adjacent to the tracks within switch limits at Chacra was customarily used by employees of defendant at all hours of the day and night and in all kinds of weather in dismounting from trains and in passing along, while inspecting and making necessary running repairs. The jury found from this substantial evidence that this territory was in fact a work place, that the bridge was a work place, and that the duty of reasonable care required it to be equipped for safe usage, that this duty had been violated and that such violation contributed to the cause of petitioner's injuries.

A case in point is *Cawman vs. Pennsylvania Reading Seashore Lines,* 110 F. 2d 832, decided by the Third Circuit Court of Appeals in 1940, certiorari denied, 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct. 24. A brakeman fell to his

death when dismounting from a caboose stopped on an unguarded bridge, while engaged in the performance of his duties. Like petitioner here, his personal representative relied on the failure of the employer to furnish a reasonably safe place to work. The Court stated:

> "There was no light, guard rail, or cat walk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think this omission may constitute a breach of the conceded obligation to provide a safe place to work * * *. That obligation assumes as many forms as there are places to work. * * * The provision of mechanical safeguards is more simple than the employment of careful employees. Men are more fallible than machines, one lantern or a few boards and a man's life is saved."

See also *Bly vs. Southern Railway,* 183 Va. 162, 31 S. E. 2d 564, rehearing denied, 183 Va. 406, 32 S. E. 2d 659; *Bimberg vs. Northern Pacific Railway Company,* 217 Minn. 187, 14 N. W. 2d 410, (certiorari denied, 322 U. S. 752, 65 S. Ct. 87, 89 L. Ed. 602; *Rashaw vs. Central Vermont Railway, Inc.,* 133 F. 2d 253 (2 C. C. A. 1943); *Murphy vs. Boston and Maine Railroad,* 65 N. E. 2d 923 (Mass).

It is respectfully submitted that this holding of the Utah Court is contrary to the evidence and the controlling decisions of this Court, and that its effect is to relieve respondents from the duty of furnishing their employees a safe place to work at Chacra.

Point III.

The Supreme Court of Utah erred in holding as matter of law that defendants were not negligent in the construction, maintenance and use of the bridge at Chacra.

The majority of the Utah Court, after holding that the place where petitioner was working when injured was not

a place to work, assumed for the purpose of argument that it was a work place but, that even so respondents were under no duty to maintain it in a reasonably safe condition as such. It is difficult to follow reasoning of this sort. In reaching this strange result the majority fails to determine whether or not the bridge was safe or unsafe as matter of fact or law. Their conclusion is based upon the finding that petitioner failed to exercise due care for his own safety. The Court says:

> "The test of whether appellant in such case was guilty of a negligence of omission is whether it could be reasonably anticipated that Pauly would drop off in the dark without using the means furnished him—in this case a lantern carried with him—to discover the nature of the terrain under him, when there was a walk on the other side safe to alight upon and in the face of a rule which instructed him that 'before getting on or off equipment, employees must look for a safe footing.'" (R. 187, 188).

We are unable to perceive how or in what manner petitioner's conduct could affect the static condition of the bridge or respondents' duty with respect to its safety. If the bridge was a place to work as the Court assumed it to be, it was either safe or unsafe as matter of fact and petitioner's conduct could not in any way change, modify or eliminate the condition whatever it was.

The following excerpts from the opinion further emphasize the confusion of the Court:

> "Only in case where trouble occurred on such place on the line as to permit the train to pull into the passing track at Chacra would there be any need of the conductor alighting. The chance of the caboose stopping on this bridge would depend on where the train stopped and its length. It is obvious that the chances that it would be stopped there as against some other place between the switches of the Chacra passing were

> small. The chances that if it was so stopped on this bridge the conductor would get off or if he did that it would be on the south side of the main track and that he would not at night investigate before he alighted were so remote as to make such mishap only a possibility and not a probability. The employer need not guard against the mere possibility that an employee may start himself solely by his own act on a course of mishap, and make the premises safe against such possibility even granted it is a place to work." (R. 188, 189).

And again:

> "Certainly a prudent railroad could have anticipated that a caboose might be stopped on the bridge. But it could also anticipate that the times it would stop on the bridge would be few compared to the times it would stop off the bridge. But that when it did happen to stop on the bridge that the conductor or other employee would drop down in disregard of ascertaining what was under him when there was a platform on the other side, would be only a remote and only a possible risk which a prudent person would not consider need be guarded against. A neglect to do so cannot be considered negligence." (R. 190).

The majority have thus declared that respondents were not negligent in their use, care and maintenance of the bridge which the jury found upon substantial evidence to be dangerous and unsafe, because, first, petitioner was negligent, and second, the chances of the occurrence of such an accident are relatively small.

It is respectfully submitted that a determination made by such process of reasoning must necessarily be erroneous. In reaching this conclusion the Court disregarded all of the evidence, facts and proper inferences in the case and by indulging in illusive, speculative conjecture as to the probabilities of the happening of such an occurrence and as to what petitioner should have done under the cir-

cumstances finally concludes that respondents were under no duty to maintain the bridge in a safe condition.

There is no escape from the conclusion that respondents not only knew that their train crews customarily used the territory within switch limits at Chacra as a work place, but that they actually required these crews to make such use of said territory. It was not necessary for the majority to assume for the purpose of argument that this territory was a work place. That being true, the solution of the question as to whether or not this work place was maintained in a safe and proper manner depends upon the evidence pertaining to the usage of the territory and its condition at the time of the accident. It appeared without conflict from the map and photographs (Exhibits A, B, D, E, H, M) and from the testimony of witnesses that the bridge was not equipped with footwalks, guard rails, lights or markers; that the roadbed was constructed of black slag and that on a dark and stormy night the bridge was indistinguishable from its surroundings, and that respondents' train crews were required to bring trains to a stop on these tracks at all hours of the day and night and in all kinds of weather, and that when stopped it became and was necessary for trainmen to dismount at the point where the engine or caboose was stopped and to pass along the trains over the territory adjacent to the tracks in the performance of their duties.

Reasonable minds could well foresee the possibility of a trainman intent upon the performance of his duties stepping off a caboose or engine and falling headlong to the bottom of the creek when the caboose or engine was stopped over the bridge on a dark and stormy night. The majority eliminate this factor by holding as matter of law that the chances of such an occurrence are relatively small and that petitioner should have been more careful. By such

process the Court has usurped the functions of the jury, deprived petitioner of his right to jury trial, and relieved respondents from their non-delegable duty of furnishing safe places for their employees to work. It is submitted that if reasonable minds could foresee the possibility of harm to a member of a class in the ordinary usage of the bridge as a portion of a work place, then duty would dictate and require the exercise of reasonable care to avoid the foreseen possibility of harm. We submit that under the doctrine of *Bailey vs. Central Vt. Ry. Co.*, supra, this bridge was a work place and that respondents owed to petitioner and other employees the duty to make it safe. In declaring the law, this court in that case stated:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in federal jurisprudence. * * * As stated by this court in the Patton Case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' * * * It is that rule which obtains under the Employers' Liability Act. * * *"

We believe that reasonable minds will not differ on the proposition that the unguarded bridge at Chacra was much more hazardous than the protruding plank in *Chicago Great Western Railway Company vs. Peeler*, 140 F. 2d 865 (1944--8th CCA) or the umbrella plant in *Haskins vs. Southern Pacific Company*, 3 Cal. App. 2d. 177, 39 P. 2d 895 or the angle iron in *Smith vs. Schumacker*, 30 Cal. App. 2d 251, 85 P. 2d 967, Cert. den. 307 U. S. 646, 83 L. Ed. 1526, 59 S. Ct. 1046, or the spike in *Virginia Railway Company vs. Staton*, 84 F 2d 133 (4th C.C.A.) Yet in all of those cases recovery was allowed. The unguarded bridge

was a permanent fixture, it extended 92 feet along the territory where employees were required to perform the duties of their employment. The plank, umbrella plant, angle iron and spike were temporary and insignificant when compared with this unguarded bridge, the chances of injury from them as compared to the chances of injury from the bridge are inconsequential.

The majority of the Utah Court hold that respondents were not guilty of a violation of duty because they could not be charged with the duty to anticipate the negligence of petitioner. To use their own language: (R. 190)

> "Thus we are referred back to the fundamental question under consideration, viz., whether the appellant owed any duty to the plaintiff under the circumstances in this case. That involves an application of the time-worn principle as to whether the defendant as a prudent person could or should have reasonably anticipated that (1) a caboose would stop on the bridge and (2) that the conductor in the caboose would step off without looking, or, if he looked, would, in seeing nothing but darkness, not use his lantern to reveal the situation under him especially when there was a platform on the north side of the main track on which he could have alighted."

By so construing and considering petitioner's conduct the Utah Court has in effect made contributory negligence a complete defense in an action brought under the Federal Employers' Liability Act, it has thus judicially repealed that portion of the F. E. L. A. which eliminates contributory negligence as a defense in such actions.

From the language of the majority it is apparent that they are not in accord with the holding of this Court in the *Tiller* case, supra. They say (R. 186):

> "It is to be hoped that in industry generally this differentiation between a workman having assumed

> the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law."

Their holding in this case reflects that attitude. They use the outlawed defense of contributory negligence to determine the nonexistence of respondents' negligence and hold that because of petitioner's negligence, respondents owed him no duty to platform or light the south side of this unguarded bridge. The act eliminates contributory negligence as a defense as completely as it eliminates assumption of risk for such purpose.

The majority opinion of the Utah Court indicates that the presence of the flooring between the tracks was, as matter of law a discharge of respondent's duties to its employees, but under the court's own reasoning it was not necessary for respondents to furnish flooring between the tracks or on any other portion of the bridge because the bridge itself was not within or a part of a work place.

Under proper instructions, the jury found that respondents should have reasonably foreseen the likelihood of injury to their employees because of the condition of the bridge; they further found that respondents did not keep this portion of the territory (the unguarded and unlighted bridge) safe either reasonably or at all. In any event, the whole matter was left to the jury to determine as matter of fact. In order to hold the respondents liable, it was necessary under the instructions for the jury to find, and they did find (1) that respondents could reasonably anticipate that petitioner or other employees would alight in the nighttime from the south side of respondent's train while it was on the Chacra bridge, (2) that respondents did not maintain the south side of said bridge in a reason-

ably safe condition, (3) that such failure amounted to a lack of due care and in whole or in part proximately caused petitioner's injuries. (See instruction No. 9, R. 14.)

The verdict certainly rested upon an evidentiary basis and the majority of the Utah Court erred in vacating and setting it aside.

Point IV.

The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

(a) In holding that the failure of respondents to properly equip the bridge did not contribute to cause petitioner's injuries, and

(b) That petitioner was negligent and that such negligence was the sole proximate cause of his injuries.

(a) *The Utah Court erred in holding that the failure of respondents to properly equip the bridge did not contribute to cause Petitioner's injuries.*

The majority hold that the failure of respondents to light or platform the Chacra bridge "would not have caused or contributed to his accident, or put another way, the plaintiff's accident" was "not a contributed result of the lack of a platform to stop him" (R. 190)

This holding on the question of proximate cause is in conflict with *Tennant vs. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409. There the question was whether the failure to give warning of the intended movement of an engine could be found by the jury to be a proximate cause of the death of an employee. The Court said:

> "The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable for * * * death resulting in whole or in part from the negligence of any of the * * * employees."

A jury could reasonably find that the absence of the platform contributed to cause petitioner's injuries. If the platform had been there he would have alighted on it and would not have been injured. Petitioner "would not have been injured" but for the failure to platform the bridge, "but for the failure to warn by lights of the presence of the bridge." A platform "might well have saved" him from injury. Proximate cause is ordinarily a question for the jury. *Lavender v. Kurn*, Supra, *Bailey v. Central Vermont R. R. Co.*, Supra, *Tennant v. Peoria and Pekin Union R. Co.*, Supra.

(b) *The Utah Court erred in holding that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.*

Petitioner's negligence was for the jury. It is submitted that the verdict of the jury on this matter should be accepted just as we believe it should be accepted on the question of respondents' negligence. The majority hold that petitioner was negligent as matter of law because (1) he did not use his lantern or fusee to see what was before him, (2) he acted on the impression that the caboose had passed over the bridge, and (3) he alighted on the south side of the tracks instead of the north side.

The jury found that petitioner was contributorily negligent and therefore reduced his damages one-third. We believe that this matter was properly submitted to the jury and that the Supreme Court was in error in holding that petitioner was negligent as matter of law.

The evidence established without contradiction that the acts of petitioner were in accordance with the practice of railroad workers. As to the ordinary way of dismounting from a train in the nighttime petitioner testified:

> "You look down as you step, you don't make any examination with your light, you have your light in your hand, you just step down, see that it is black and you walk along for footing, you don't take any time to examination." (R. 143).

And again:

> "I never made any examination, with my lantern as to where I was stepping, but just like all railroad men when they are getting on and off of a car, they make a glance. It looked like it was black when I stepped, looked like I was still standing on the right of way." (R. 95, 96).

That he did not make a minute examination and feel his way along did not make him negligent as matter of law. He was acting in the usual and ordinary manner and as other railroad men usually acted. By reason of the darkness of the night and the black roadbed he mistakenly believed the caboose was over solid ground. There was nothing furnished by respondents or anyone else to call his attention to the location of this bridge. He was in the performance of his duties to expedite the movement of his train and he did not make a thorough examination of the roadbed.

He dismounted in accordance with respondents' safety rules, on the side away from passing tracks, and the testimony was uncontradicted that this was the proper side from which to dismount inasmuch as the difficulty to be located and remedied appeared to be on that side and he therefore "naturally" alighted from that side. (R. 90).

That he was under the impression that the caboose had passed the bridge and acted on that impression would not be negligence as matter of law. The majority even admits it was a "very human thing to do." (R. 183). Certainly respondents afforded no warning to dispel that impression. Therein were they negligent.

The Utah Court, not being content with the finding of the jury to the effect that petitioner was negligent, goes further and holds as a matter of law that the negligence of petitioner was the sole proximate cause of his injury. This finding of negligence was employed to support the finding of absence of duty on the part of respondents and thus to become a complete defense to petitioner's action. The Federal Employers' Liability Act expressly eliminates contributory negligence as a defense (*U. S. C. A., Title 45, Sec. 53*). In the very face of this plainly worded statute the majority of the Utah Court held that the contributory negligence of the petitioner barred recovery. They reach this erroneous result by using the simple expedient of calling contributory negligence "sole proximate cause." This Honorable Court denounced this subterfuge in *Grand Trunk Western R. R. Co. vs. Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838, in the following language:

> "• • • and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendants' negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

This doctrine was reaffirmed in *Tiller vs. Atlantic Coast Line R. Co.*, supra. The holding of the Utah Court on the question of proximate cause is likewise contrary to the decisions of this Court in: *Illinois C. R. Co. vs. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R.*

Co. vs. Hadley, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co. vs. Campbell,* 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683.

The injuries to petitioner resulted from the concurring negligence of respondents and the conduct of petitioner. Both were necessary to produce the end result. The negligence of respondents having contributed to the cause of the injury, the question of proximate cause was properly left to the jury and the majority of the Utah Court erred in substituting its judgment for that of the jury and in setting aside the verdict and dismissing the case.

CONCLUSION

If this divided opinion of the Supreme Court of Utah is permitted to stand, the Federal Employers' Liability Act will not afford railroad workers in Utah the same remedy and protection that it affords in other jurisdictions where the decisions of this Court are respected and followed. It will not do to say in Utah that the decisions of this Court are controling where the interpretation and effect of the Federal Employers' Liability Act is involved, since trial courts usually follow the decisions of their immediate appellate courts. The opinion in this case has been used and is now being used in the trial courts of Utah to defeat the rights of railroad workers to jury trial contrary to controlling principles laid down by this Court. Under the majority opinion there can be no recovery by an injured employee who is guilty of contributory negligence in Utah because the existence of negligence on the part of the railroad is now held to depend on whether or not the railroad can anticipate the employee's negligence and no such anticipation being required, negligence on the part of the railroad cannot

be established. Contributory negligence is called "sole proximate cause" in Utah and liability is denied as matter of law where such negligence exists.

It is respectfully submitted that the opinion of the majority of the Supreme Court of Utah is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act, that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the Utah Court and finally reverse the same, and reinstate the judgment of the trial court without the necessity of further briefs, arguments or proceedings.

Respectfully submitted,

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